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71-655

IN THE

Supreme Court of the United States

October Term, 1971

FRANCIS PETER CROSBY and
VINCENT JOSEPH CALISE,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Francis Peter Crosby and Vincent Joseph Calise respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on September 16, 1971, affirming a judgment of the United States District Court for the Southern District of New York, convicting them of conspiracy wilfully to misapply the funds of a small business investment company (18 U.S. Code Sec. 371) and (as to petitioner Crosby) of substantive violations (18 U.S. Code Sec. 657).

Opinion Below

No opinion was rendered by the United States Court of Appeals herein.

Jurisdiction

The judgment of the aforesaid Court of Appeals was rendered and entered on September 16, 1971. The time to file the present petition was duly extended by a Justice of this Court to November 15, 1971.

The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254. The basis for federal jurisdiction in the United States District Court was the provisions of 18 U.S. Code Sec. 371 and 18 U.S. Code Sec. 657.

Questions Presented for Review

1. Was the evidence against petitioners sufficient to support a conviction of any of the crimes charged?

2. Was the charge erroneous as to petitioner Crosby's participation as an aider and abetter?

3. Does the indictment sufficiently charge the commission of the substantive crimes, and are its shortcomings a deprivation of the rights guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States?

Statutes Involved

18 U.S. Code Sec. 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such person commit any act to effect the object of the conspiracy, each shall be

fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S. Code Sec. 657, so far as pertinent provides:

> "Whoever, being an officer, agent or employee of or connected in any capacity with . . . any small business investment company . . . embezzles, abstracts or wilfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . ."

Statement of Case

Both petitioners were convicted on the conspiracy count, and petitioner Crosby on the five substantive counts. A codefendant, one Pierson, pleaded guilty to the first substantive count (count 2 of the indictment.)

It was the Government contention that Crosby, through nominees, had acquired a small business investment company, namely Roosevelt Capital Corporation; that the latter made a $60,000 loan to United Film World, a corporation in which Crosby had an interest, and another loan to Trans-World Theatricals, Inc.; that the second loan was conditioned upon a reloan to Contractors Guild, Inc., which Crosby was claimed to control through a nominee. It was also urged that one Olanow, a Government witness and alleged coconspirator, had purchased 1,000 shares of Texas Gulf Sulphur stock and delivered them to the First National City Bank against payment; that the stock declined, resulting in a $10,000 loss; and that the repayments of advance and loss were taken, directly or indirectly, by Crosby and Pierson. The Government elected at the conclusion of trial to proceed on the theory of wilful misapplication of Roosevelt Capital Corporation's funds, charging Crosby to be a person connected with that company as an agent, while

the Court submitted to the jury the issue of whether or not Crosby was an aider or abetter and thus guilty as a principal. As for petitioner Calise, the Government attempted to show that he assisted in the conversion of funds after their disbursement by the corporation.

The Government's case rested mainly on the testimony of three persons with serious criminal records—Olanow, Pierson and one Stone, the latter having been convicted of perjury. According to Pierson, he had formed United Film (for motion picture distribution purposes) prior to the acquisition of Roosevelt Capital), and that Crosby was to obtain a 50% interest in United upon certain conditions which never materialized, so that he never regarded Crosby as a co-owner; accordingly, Pierson issued all of United's checks and was in complete control. As for Contractors Guild, the witness Stone owned all the stock but claimed to do so as Crosby's nominee. Stone's testimony is permeated with repeated admissions of perjury. The Government admitted that the loan to Trans-World was at most an error of judgment but claimed the reloan of $44,000 to Contractors was tantamount to a wilful misapplication of funds.

We shall not unduly extend this petition by a minute analysis of the evidence. However, it is abundantly evident that the factual issues were closely contested, so as to render the protection of petitioner's rights imperative.

REASONS FOR ALLOWANCE OF WRIT

I.

The evidence against petitioners was not sufficient to support a conviction of any of the crimes charged.

The case was submitted to the jury on the theory of conspiracy to misapply Roosevelt Capital Corporation

funds. Thus petitioner Calise was charged with assisting in such conversion after those funds were loaned to United and after the funds loaned to Trans-World were reloaned to Contractors. Even if it be assumed that there was a conspiracy to misapply Roosevelt funds, it would have terminated with the loan to United—the loan to Trans-World being admittedly no application. Clearly the relending by Trans-World to Contractors did not come within the scope of Sec. 657.

The further unsound construction of the law is illustrated by the Government's inclusion in the indictment allegations as to the means by which the alleged conspirators would carry out their scheme. Thus in the conspiracy count, at paragraph 3(c)iii, it is charged that Crosby and Pierson diverted moneys and securities whereby Olanow attempted to repay a loan made by Roosevelt. Such conduct, assuming it occurred, was no misapplication of Roosevelt funds.

Likewise the loan to United alleged in par. 3(c)i of the conspiracy count was admittedly for proper purposes which Pierson detailed to Crosby (see record, pp. 442-443) and was no crime under the law. See *United States* v. *Mulloney* (D.C. Mass.) 8 F. Supp. 674, affd. 79 F. 2d 566, cert. den. 296 U.S. 658.

Moreover, the case was submitted to the jury on the theory of misapplication of moneys and funds, although the alleged reloan from Trans-World to Contractors, the alleged attempt to divert the Olanow repayment and Calise's signing of checks of Contractors and United all involved "credits" rather than moneys or funds. See *Robinson* v. *United States* (C.C.A. 6) 30 F. 2d 25.

Particularly as to Calise, charged only with conspiracy, the proof was crucially insufficient to justify submission to the jury. There was no evidence of his participation in the acquisition of Roosevelt or in its operation or affairs,

or even that he was an agent or employee of that corporation. The Government's apparent case against him seemed to rest on the charge that after the loans to United and Trans-World he assisted in a further misapplication. If anything, this might conceivably indicate an intent to convert funds of borrowers, but not the conspiracy of which he was accused. His posture was manifestly that of chauffeur and errand boy (109, 434, 629). It must also be remembered that mere knowledge, and even approval of or acquiescence in, the object and purpose of an alleged conspiracy, without agreement to cooperate in accomplishing its object, is not sufficient to render one a party thereto. *Jones* v. *United States* (C.A. 10) 365 F. 2d 87.

In this connection it must be noted that the Government procured the convictions sought to be reviewed by the use of the conduct and statements of coconspirators. The use of such evidence has been held by the First Circuit to be improper. *United States* v. *Spock*, 416 F. 2d 165. The Second Circuit, however, appears to follow a contrary doctrine. *United States* v. *Baker*, 419 F. 2d 83; *United States* v. *Jacobs*, 431 F. 2d 754. This difference suggests the propriety of clarification, especially in view of this Court's holding in *Krulewitch* v. *United States*, 336 U.S. 440.

II.

The charge was erroneous as to Crosby's alleged participation as an aider and abetter.

The Court charged (901, 902) that Crosby could be found guilty of the five substantive counts as an aider and abetter if he knew what was afoot, made himself part of the scheme and took steps to see that the payments would be made. The Court made no mention of the requirement that, in order to convict as an aider or abetter, the jury had to find that a person other than defendant had

committed the substantive offense. Exception was duly noted (907), inasmuch as the only conceivable such principal was Pierson, who had pleaded guilty to only one of those five substantive counts.

In order to convict a defendant of aiding and abetting the commission of a substantive offense, the proof must establish that the crime was committed by some one. *United States* v. *Provenzano* (C.A. 3), 334 F. 2d 678, cert. den. 379 U.S. 947. "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense." *Morgan* v. *United States* (C.C.A. 10) 159 F. 2d 85. This rule has been applied to charges under a similar statute (18 U.S. Code Sec. 656) involving misapplication of bank funds, namely, a conviction for aiding and abetting will not be upheld in absence of proof of the principal's guilt. *United States* v. *Titus* (C.A. 2), 210 F. 2d 210; *Giragosian* v. *United States* (C.A. 1), 349 F. 2d 166. Accordingly, the refusal to charge as requested with respect to this point was reversible error.

III.

The substantive counts in the indictment are insufficiently charged, in consequence of which petitioners' constitutional rights are violated.

Both prior to trial and at the close of the Government's case, counts 2 through 6 were the subject of a defense motion to dismiss for insufficiency (13, 75). Both motions were denied. The five counts occupy less than a page and merely allege in the statutory verbiage that defendants wilfully misapplied funds and credits on certain dates and in certain amounts.

In *United States* v. *Wiggenhorn* (C.A. 9), 312 F. 2d 289, affirming the dismissal of an indictment, the Court unequivocally declared the law to be well settled that

"an indictment charging that a defendant wilfully misapplied the moneys, funds or credits of a bank . . . is fatally defective unless it contains allegations to show how the application of the moneys, funds or credits of the bank was made, and that such application was an unlawful one. To like effect are *Johnson* v. *United States* (C.C.A. 4), 95 F. 2d 813; *United States* v. *Matsinger* (C.A. 3), 191 F. 2d 1014; and this Court's holding in *United States* v. *Britton*, 107 U.S. 655.

That this principle is mandated by the Fifth and Sixth Amendments, and that an indictment violative of the requirement of precise and specific allegations, cannot be sustained, are matters thoroughly discussed and expounded in the opinion of Mr. Justice Stewart in *Russell* v. *United States*, 369 U.S. 749.

Nor was the indictment's insufficiency herein a mere technicality, for while the Government expressly rested its case on wilful misapplication (763-764), the defendant Pierson pleaded guilty to embezzlement (7) on the second count. Thus it becomes a matter of speculation whether the jury's verdict determined that petitioner Crosby was guilty as a principal or as one aiding a wilful misapplication. In short, the inadequate format of the indictment was virtually a permission to the Government to present whatever evidence it desired, with the result that a conviction may well have been predicated on evidence not even presented to the grand jury.

Conclusion

The case is one wherein the two petitioners have been convicted and sentenced under circumstances indicative of deviations from established law. It is further manifest that the present application presents meritorious and certainly arguable questions of a kind likely to arise in other

cases and calling for authoritative disposition; also that in at least one instance there is a conflict of opinion among the several Courts of Appeals. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioners be granted such other, further and different relief as may seem proper.

Dated: New York, N.Y.
November 10, 1971

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(APPENDIX)

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS PETER CROSBY, *et al.*,

Defendants,

FRANCIS PETER CROSBY, and VINCENT JOSEPH CALISE,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

NO OPINION

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PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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453-511—72

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1971. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 15, 1971. The petition was filed on November 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions.

2. Whether the instructions to the jury on aiding and abetting correctly stated the law.

3. Whether the substantive counts of the indictment were defective.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of having conspired to violate 18 U.S.C. 657 by injuring and defrauding a company licensed under the Small Business Administration Act of 1953. Petitioner Crosby was also convicted of five substantive violations of Section 657.[1] Petitioner Crosby was sentenced to an interim commitment for a study pursuant to 18 U.S.C. 4208 (b) pending final sentence. Petitioner Calise was sentenced to imprisonment for one year and a day. The court of appeals affirmed without opinion (Pet. App.).

At trial co-defendant Pierson, who pleaded guilty, and two unindicted co-conspirators (Olanow and Stone) testified as prosecution witnesses. Their testimony, plus documentary proof in the form of letters, signed agreements and cancelled checks introduced by the government, showed a scheme to purchase Roosevelt Capital (Roosevelt), a small business investment company licensed by the Small Business Administration (S.B.A.), with Roosevelt's own funds, and thereafter

[1] Petitioner Calise was charged only in the conspiracy count.

to mulct the company's remaining funds[2] principally through three loan transactions with shell corporations created by various of the co-conspirators.

1. Early in 1964, petitioner Crosby, the owner of a company named Contractor's Guild (Contractors) (T. 283, 597),[3] employed Olanow as a finder (T. 77–78), indicating interest in acquiring small business investment companies (T. 86). Thereafter, Olanow learned that Roosevelt was for sale. On Crosby's instructions, Olanow entered into an agreement, dated April 28, 1964, with Talmadge, one of the Roosevelt owners, to purchase Roosevelt (T. 88–95). When Pierson agreed to act as ostensible buyer of Roosevelt (T. 93) (with the understanding that the company was to be owned by petitioner Crosby through Contractors (T. 280–282)), Olanow transferred the agreement to Pierson. Crosby told Olanow that Pierson would sign all documents and would be responsible for paying Olanow the $10,000 finder's fee which Crosby had agreed to pay (T. 93–95).

Prior to the Roosevelt closing, Crosby explained to Pierson that part of the money to purchase Roosevelt would come from a loan of $42,000 by an individual named Fiorito who was to be repaid immediately. In addition the two men discussed loans to be made by Roosevelt upon its acquisition, one to United Film

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[2] Roosevelt, which had conducted business since February 1962 (T. 57), had originally been capitalized with a stockholders' contribution of $155,000 and an S.B.A. loan of $150,000. At the time the conspirators took control, on May 14, 1964, Roosevelt's capital ($305,000) was divided between a $118,000 loan portfolio and $187,000 in cash and matured Treasury notes (T. 688–690).

[3] "T." refers to the transcript of proceedings.

World (a company formed by Crosby and Pierson) and another to an organization named Trans-World Theatricals (Trans-World). So that it would not appear that the United loan represented self-dealing, new directors, among them petitioner Calise, were named for United (T. 303–304). Pierson and two other men, Stone, an attorney, and Wallen, were designated to be officers of Roosevelt.

Before the closing, Crosby met Pierson, Calise and Stone in a coffee shop and gave them instructions (T. 97, 98, 104, 294, 585–587). At the closing, which Crosby did not attend, it was discovered that Fiorito had not arrived with the loan money. Olanow went to another room and produced two cashier's checks of the Franklin Bank, one for $118,000 and another for $42,000 (T. 295–297, 311). This money came from Roosevelt funds.[4]

Immediately after the closing Pierson issued on the Roosevelt account a check for $60,000 which Stone endorsed to open an account for United (T. 304–308). Petitioner Calise, a United director, immediately issued a $42,000 check on the United account to Pierson which was used to repay the remaining $42,000 of the $160,000 purchase price money advanced by the

[4] Talmadge, a representative of Roosevelt's sellers, issued a letter to the Franklin Bank authorizing the transfer of $187,000 in Roosevelt funds from the Islip office to the Hanover Square office (T. 693–694, 823–824). Mastrodano, the bank officer, then issued the two cashier's checks (Gov't Exhs. 7A and 7B) to Talmadge. Talmadge endorsed the larger check back to Roosevelt in payment for the loan portfolio which the sellers retained (T. 297). Roosevelt then repaid $118,000 of the $160,000 Franklin Bank advance.

Franklin Bank (T. 304, 308–311). This completed the purchase of Roosevelt with its own assets.

Petitioner Calise also wrote a letter to the Franklin Bank authorizing the release of $10,000 in United funds payable to Pierson which was used to pay Fiorito's commission.[5] In addition, Pierson issued a second check (Gov't Exh. 14 B) on the Roosevelt account, again for $60,000, the proceeds of which were used to open an account for Trans-World (T. 315). Meyers, the president of Trans-World, as he had agreed earlier with petitioner Crosby (T. 213–217), then loaned $44,000 to Contractors which was used to open an account in its name (T. 315–317). Thereafter, the petitioners, Pierson, Stone and Olanow discussed the closing and Pierson issued checks to Olanow and Stone for their services (T. 103, 109–110).

A few days after the closing, after a discussion among petitioner Crosby, Olanow and Pierson, Roosevelt gave Olanow a thirty-day loan of $58,648 to purchase 1,000 shares of Texas Gulf Sulpher stock. A week later, June 4, 1964 (T. 832), after the stock had dropped $10,000 in value, Crosby and Pierson informed Olanow that the stock would have to be used for the purchase of stock in a company called Wiek Investing Corporation (T. 115, 117–118). The stock was given to another shell, United Nation's Financial

[5] Fiorito arrived late at the closing (T. 103–104), and was brought to the meeting by petitioner Calise (T. 296). Olanow's decision to go ahead without Fiorito was motivated by a desire to avoid a commission (T. 297), but it was discovered that a commission "had to be paid Mr. Fiorito" whether his check was used or not (T. 312).

(U.N.), which had been formed by Stone some days earlier at petitioner Crosby's request (T. 364–365, 383–384, 595, 599–600), and U.N. then used the stock as a down payment for the purchase of the Wick Investment Corporation (T. 382–383). Olanow repaid the $10,000 loss he had incurred in his stock speculation, but not to Roosevelt (T. 117, 119–121).[6]

The three loan transactions involving United, Contractors through Trans-World,[7] and U.N. were sham transactions involving no real security (T. 306–308, 317, 384). Indeed, no interest was paid or demanded on these loans, nor was there any effort made in 1964 to collect them (T. 407–408). The assets of the borrowing companies not dissipated by other transactions were, by the fall of 1964, wasted through so-called business expenses charged to the companies (T. 429–433). For example, following the closing Pierson maintained his family at a New York hotel and made a number of trips, including one to Europe (T. 341–342, 343, 354, 365, 371, 373–374, 402). Other individuals with no real connection with any of the companies charged similar expenses (T. 350, 351, 353–354, 365, 372). A number of checks were issued to petitioner

[6] Olanow signed a note acknowledging the debt to United. Thereafter, he made payments to various corporations and individuals designated either by petitioner Crosby or Pierson (T. 120–123). One of the checks (Gov't Exh. 67 C) was endorsed by petitioner Crosby for deposit to Contractors' account.

[7] The charges in this case did not include the $16,000 in Roosevelt funds retained by Trans-World, but pertained only to the $44,000 loaned to Contractors through Trans-World (T. 241, 407).

Calise for expenses on a leased vehicle (T. 338, 357–358, 374).[8] The proof showed that other checks for substantial sums of money, totalling at least $27,000, had also been issued to petitioner Calise (T. 335, 351–352, 354, 362). It was, however, Pierson's belief, based upon the relationship of the petitioners, that Calise was simply cashing checks and turning the proceeds over to Crosby (T. 355–356, 362–363).

ARGUMENT

1. The sufficiency of the evidence to support the conviction is established by the summary of the facts in the Statement. As to Crosby, it was shown that the conspiracy had its origins in his plans to acquire capital through the acquisition by nominees of one or more small business investment companies. Thereafter, he directed and controlled the activities of the others in purchasing Roosevelt and manipulating its funds. The verdict of guilty as to Crosby was supported by the evidence.

While petitioner Calise was not shown to have been a principal in the conspiracy, there was, as the trial court ruled (T. 53), sufficient evidence to make his guilt a jury question. Calise was aware of the object of the conspiracy. He worked closely with Crosby and was present with all of the co-conspirators at meetings before and after the Roosevelt purchase. His activities were more than those of an "errand boy" (Pet. 6). At the bank he brought in Fiorito whose money, at least as

[8] The endorsement on one check indicated it had been used in payment of petitioner Calise's rent (T. 358).

originally planned, was needed to purchase Roosevelt. As an officer of United, he authorized payment to Pierson for his role as the finder of Roosevelt. He issued a United check to pay the bank part of the purchase price ($42,000). He also obtained and endorsed checks for substantial sums which he may have turned over to petitioner Crosby. The jury could reasonably conclude that petitioner Calise was a knowing participant in the conspiracy.

2. Petitioner Crosby objects to the trial court's instructions on aiding and abetting. The argument is that since Pierson, who is described as the only conceivable principal, had pleaded guilty to only one substantive count, petitioner Crosby could not be convicted of aiding and abetting more than one substantive crime. This argument is frivolous.

Assuming that the jury regarded petitioner Crosby as an aider and abettor and not as a principal, his convictions on the substantive counts did not depend upon the disposition of Pierson's case. The government was required to prove, as it did, that the substantive crimes charged were committed by some one.* It was also required to prove the aiding and abetting by petitioner Crosby. *White* v. *United States*, 366 F.2d 474 (C.A. 10). There was no requirement that, before Crosby could be found to have aided or abetted each substantive crime, the principal had to be convicted or even identified. *United States* v. *Provenzano*,

* Pierson and the other named co-conspirators were all individuals who in the language of the statute violated, 18 U.S.C. 657, were "* * * connected in any capacity with * * * any small business investment company," Roosevelt, and thus were possible principals.

334 F.2d 678, 691 (C.A. 3), certiorari denied, 379 U.S. 947. See also *Feldstein* v. *United States*, 429 F.2d 1092 (C.A. 9), certiorari denied, 400 U.S. 920; *Hendrix* v. *United States*, 327 F.2d 971, 975 (C.A. 5). There was substantial evidence to show that petitioner Crosby was associated with each substantive crime proven, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed. *United States* v. *Peoni*, 100 F.2d 401, 402 (C.A. 2). More was not required.

3. Relying upon *United States* v. *Britton*, 107 U.S. 655, and later cases, petitioner contends that the substantive counts of the indictment were defective in that, while they charged misapplication of Roosevelt funds, they failed to specify the means and illegality of the misapplication. However in this case, petitioner Crosby was not charged simply with willful misapplication, as were the defendants in the authorities relied on by him. The charge on the substantive counts was that petitioners Crosby and Pierson "unlawfully, wilfully and knowingly, and with intent to injure and defraud (Roosevelt), did embezzle, abstract, purloin and wilfully misapply (Roosevelt) moneys * * *." It was thus clear that the substantive counts of the indictment could not be read to charge mere "maladministration," the danger with which this Court was concerned in *Britton*, see 107 U.S. at pp. 667–668.[10] The confusion now asserted as to whether the

[10] *Britton* was decided under a former statute having to do with misapplication by officers of national banks. The indictment contained 119 counts some of which were held sufficient and others insufficient. The defendant, a president of an association,

government's theory was that petitioner Crosby had embezzled or misapplied Roosevelt funds could have been clarified by a motion for a "bill of particulars." That no such motion was ever made (T. 59) indicates that petitioner was apprised of the nature of the charges.[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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was charged in Count 37 and other similar counts with having "wilfully misapplied its moneys * * * by buying therewith certain shares of its stock, with intent to injure and defraud the association * * *." As to those counts this Court ruled that it was not enough to aver that the defendant willfully misapplied the monies, concluding that "[t]here must be averments to show how the application (conversion) was made and that it was an unlawful one." 107 U.S. at 669.

[11] The fact that Pierson entered a plea of guilty to what was described as embezzlement (T. 7) while the government's announced theory of the case was that of willful misapplication (T. 763–764) is no evidence that the jury was confused and left to speculate as to petitioner Crosby's guilt. The court's instructions defined for the jury the meaning of the term misapplication.

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